Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for Decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; Pharmaprix, Shoppers Drug Mart Inc.; Les services Santé Claude Gervais Inc.; Entreprise David Tan Inc.; Gestion Noura A. Shahid Inc.; Gestions Fortier-Allan Inc.; 2321-5510 Québec Inc.,

respondent employers,

and

Uniprix Inc.; 3908852 Canada Inc.; Bishara Pharma Inc.; Société J. Lacroix Inc.; Gestion Morico Inc.; Louise Fortin Paquette Pharmacienne; Familiprix Inc.; Groupe Hebert, Ferlatte Inc.; Gingras, Hébert et Associés, Pharmaciens General Partnership; Hébert et Associé, Pharmaciens, General Partnership; Charest-Pharma Inc.; St-Louis Pharma Inc.; Pointe Ste-Foy Pharma Inc.; Hébert, Ferlatte et Associés, Pharmaciens, General Partnership; Pharmacie Sylvie Champagne Pharmacien Inc.; Pharmacie Mathieu Sabourin et Mathieu Labonté Pharmaciens Inc.,

interested parties (intervenors).

Board File: 27977-C
Neutral Citation: 2012 CIRB **638**
March 22, 2012

Canada

The Canada Labour Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Patrick Heinke and Norman Rivard, Members.

Parties' Representatives of Record

Mr. Jean-François Beaudry and Ms. Stéphanie Lindsay, for the Canadian Union of Postal Workers;
Messrs. Luc Beaulieu and Lukasz Granosik, for the Canada Post Corporation;
Mr. Guy Lemay, Ms. Josiane L'Heureux and Mr. Guy Lavoie, for Pharmaprix, Shoppers Drug Mart Inc.;
Mr. Richard Lacoursière, for Les services Santé Claude Gervais Inc., Gestion Noura A. Shahid Inc., and Gestions Fortier-Allan Inc.;
Messrs. Christopher Deehy and Shawn Connely, for Entreprise David Tan Inc., 2321-5510 Québec Inc.;
Ms. Annie Francescon, for Uniprix Inc.;
Messrs. Philippe-André Tessier and Jean-Denis Boucher, for 3908852 Canada Inc., Bishara Pharma Inc., Société J. Lacroix Inc., Gestion Morico Inc., and Louise Fortin Paquette Pharmacienne;
Mr. Jacques Reeves, for Familiprix Inc.;
Mr. Simon-Pierre Hébert, for Groupe Hebert, Ferlatte Inc., Gingras, Hébert et Associés, Pharmaciens General Partnership, Hébert et Associé, Pharmaciens, General Partnership, Charest-Pharma Inc., St-Louis Pharma Inc., Pointe Ste-Foy Pharma Inc., and Hébert, Ferlatte et Associés, Pharmaciens, General Partnership;
Mr. Luc Jobin, for Pharmacie Mathieu Sabourin et Mathieu Labonté Pharmaciens Inc.; and
Mr. Dany Millard, for Pharmacie Sylvie Champagne Pharmacien Inc.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I–Background

[1] In this matter, the Board is being called upon to determine the admissibility as evidence of Mr. Michael H. Seid's report dated October 26, 2011 (the Seid report), which the Canada Post Corporation (the CPC) sent to the parties on November 21, 2011. On April 27, 2011, the CPC indicated that it wanted to call an expert witness in concessions and franchises and also enter his expert report into evidence. On November 25, 2011, the last day of hearing, the Canadian Union of Postal Workers (the union or CUPW) indicated to the Board that it objected to the Seid report being entered into evidence by the CPC.

[2] The Board asked the union to produce written submissions in this regard by January 27, 2012. It gave the CPC until February 10, 2012, to respond to those submissions, and then gave CUPW until February 17, 2012, to reply to the CPC's response. It also asked CUPW to indicate whether or not it intended to submit a counter-report.

[3] On February 28, 2012, the CPC filed a surreply to CUPW's reply dated February 17, 2012, and CUPW filed supplemental arguments in a letter sent to the Board on March 16, 2012.

[4] Pursuant to section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*), the Board did not hold an oral hearing in relation to the admissibility of the Seid report, since the submissions made by the parties are sufficient for it to decide the matter.

II–Positions of the Parties

A–The Union

[5] The union vigorously objects to the admission of the Seid report as evidence. It moreover indicates that it will not submit a counter-report, given the major costs that doing so would entail.

[6] The union's main argument is that the Seid report cannot be admitted as evidence because it does not meet the criteria respecting admissibility of expert evidence established by the Supreme Court

of Canada in *R.* v. *Mohan*, [1994] 2 S.C.R. 9. The union reminds the Board of the four criteria that should guide it in considering the admissibility of the Seid report: the evidence must be relevant, must be necessary to assist the trier of fact, should not trigger any exclusionary rules, and must be given by a properly qualified expert.

[7] The union points out that the Board relied on these same criteria in its rulings on the admissibility of expert reports in *Air Canada*, 1999 CIRB 44; and *TELUS Communications Inc.*, 2004 CIRB 277.

[8] The union's arguments relate primarily to the criteria of relevance and necessity.

1–Relevance

[9] According to the union, the content of the Seid report is not relevant to the issue to be determined by the Board regarding the identity of the true employer, and so, it does not satisfy the first criterion established by the Supreme Court.

[10] The union further submits that the report deals directly with issues that fall precisely within the Board's expertise and so does not satisfy the second jurisprudential criterion, that of the necessity of the evidence. It states in this regard that it would have been more appropriate for the arguments pertaining to the identity of the true employer to be included in the CPC's arguments rather than in the Seid report, which it finds is a legal opinion on the issue before the Board.

[11] In regard to the criterion of relevance, the union refers to specific sections of the Seid report, submitting that part of the report deals with the notion of single employer even though the Board indicated that it would limit evidence at this stage to the matter of the true employer. The union submits that the matter before the Board involves a number of specific facts and that the document entitled "Master Dealership Agreement," which was entered into evidence in this matter, cannot be compared to a franchise agreement template, as the Seid report attempts to show. Further, the union submits that the scenario of a franchise in Canada, as it is described in the Seid report, is not relevant to identifying the true employer.

[12] The union submits that, if the Board decides that the Seid report is admissible as evidence or closely connected with the issue to be decided, the Board will have to conduct an additional assessment, that is, a cost-benefit analysis regarding the admission of the said report. The union cites the Board's decision in *TELUS Communications Inc.*, *supra*, in this regard.

[13] Moreover, the union is moreover of the view that the Seid report is of little probative value given that it is based on a comparative study of franchise contracts, which in the union's opinion do not govern the contractual relationships of a Crown corporation (referring to the CPC) entrusted with the exclusive operation of an interprovincial service.

[14] In that regard, the union submits that, should the Board determine that the Seid report has a certain probative value, that value is outweighed by its prejudicial effect, since the Seid report does not satisfy the relevance criterion set out in the case law.

2–Necessity

[15] The union submits that the Seid report does not satisfy the necessity criterion in that the report offers an opinion on issues that fall precisely within the expertise and knowledge of the specialized tribunal that is the Board. It submits that the expert cannot replace the decision maker, in this case, the Board. The union produces a whole series of excerpts from the Seid report that show that the expert is attempting to substitute his opinion for the process followed by the Board to determine the identity of the true employer. For these reasons, the union is of the view that the Seid report cannot be admitted as evidence and asks that the Board rule it to be inadmissible.

B–The CPC

[16] The CPC begins by submitting that CUPW's objection is untimely since, on April 27, 2011, it indicated that it wanted to call an expert witness in concessions and franchises and CUPW in no way objected to the testimony of that person at that time, at the hearing of April 27, 2011, nor at the hearing of May 9, 2011.

[17] The CPC also submits that the Seid report satisfies all of the expert evidence admissibility requirements, that is, the four criteria established by the Supreme Court of Canada in *R.* v. *Mohan*, *supra*. The CPC notes that CUPW has not raised any objections regarding two of the four criteria in question, that is, the fact that the evidence must not trigger any exclusionary rules and the fact that the expert must be properly qualified.

[18] With respect to the relevance criterion, the CPC submits that, unlike a regular witness who can only testify about the facts of which he or she has personal knowledge, an expert witness, also called an "opinion witness," essentially appears before a tribunal to provide it with an opinion about the facts as he or she has observed them or the facts legally proven at the hearing, based on his or her knowledge and experience. The CPC cites the Supreme Court of Canada in *R. v. Béland*, [1987] 2 S.C.R. 398, paragraph 16, in this regard.

[19] Regarding the prejudicial effect that CUPW alleges the Seid report would have if admitted as evidence, the CPC submits that the union provides no explanation regarding the actual, specific prejudice that would be caused were the Seid report to be admissible as evidence. The CPC is of the view that there is no such prejudicial effect. The CPC reaffirms that it has a fundamental right to a full and complete defence, such as the right to choose the evidence it deems appropriate.

[20] The CPC adds that the criterion that the evidence must be necessary to assist the trier of fact is important, indicating that it is in relation to this second criterion that the question of the usefulness of the expert evidence for determining the issues arises. It submits that the expert report is necessary if it contains "information which is likely to be outside the ordinary experience and knowledge of the trier of fact" (translation).

[21] The CPC reiterates the arguments put forth by CUPW in regard to the fact that the expert report is a legal opinion that falls precisely within the expertise of the Board. In that regard, the CPC submits that the very essence of an expert report and role of an expert is to provide an opinion. With respect to the report itself, the CPC submits that the purpose of the said report is to obtain a picture, drawn by an expert with unchallenged, indeed, indisputable qualifications, of the operation of concessions and franchises, the business rules applicable in the type of sector in question and the

contractual reality for concessions and franchises, both for the CPC and for the business model specific to a franchise. The CPC adds that, contrary to what CUPW is saying, the issue of determining the true employer does not come under the exclusive jurisdiction of the Board and the contractual and business model at the heart of this issue is in no way something of which the Board has *ex officio* knowledge. The CPC submits that what is involved here is a business reality and that a tribunal specializing in labour relations does not have *ex officio* knowledge of that reality, which is central to the preliminary issue, the jurisdiction of the Board.

[22] The CPC submits that refusing to hear this expert witness would be tantamount to breaching the principles of natural justice, making extensive reference to the decision of the Board in *Rogers Radio (CJMX-FM)*, 2003 CIRB 246.

[23] The CPC concludes by submitting that the Board must dismiss CUPW's objection regarding the admissibility of expert evidence in order to respect the rules of natural justice and enable the CPC to fully defend itself in this matter.

[24] Alternatively, the CPC submits that, should the Board rule that some excerpts of the report do not satisfy the relevance and necessity criteria, as challenged by CUPW, it expressly reserves the right to modify its argument to divide the report to be filed into separate parts. It also reserves all rights relative to the arguments respecting the probative value of the report.

C–Union's Reply

[25] On February 23, 2012, in reply to the CPC's arguments respecting the timeliness of its objection, the union submits that, on April 27, 2011, the CPC announced its intention to call an expert witness in concessions and franchises as part of its constitutional evidence. It submits that, at that time, the union was still unaware of the content of the report. It states that it was only on November 17, 2011, that the CPC informed the Board that it would be calling Mr. Seid in relation to the issue of determining the true employer. CUPW submits that it only had all the information on the subject matter and content of Mr. Seid's testimony and report once it received the Seid report on November 21, 2011. The union is asking the Board to reject this argument.

[26] With respect to the CPC's arguments that the Board should take into account CUPW's failure to challenge two of the four admissibility criteria, that is, the absence of any exclusionary rule and the requirement of a properly qualified expert, CUPW submits that it never waived challenging the qualifications of the expert, but that such challenge is not necessary at this stage. CUPW states that it objects to the claim that Mr. Seid has the expertise and competency to determine the identity of the employer within the context of the issue before the Board. CUPW states that the fact that the Board might be influenced by a report that is inadmissible on the basis of criteria established by the Supreme Court of Canada is prejudicial.

[27] With regard to the CPC's argument that excluding the Seid report would be contrary to the principles of natural justice, CUPW submits that the Board's decision in *Rogers Radio (CJMX-FM)*, *supra*, cited by the CPC, was issued in a different context from the one in this case and did not concern expert evidence.

[28] CUPW submits that the Seid report is legal in nature and is in fact an opinion on the interpretation of the *Code*, which falls under the Board's jurisdiction. It adds that the content of the expert report is comparable to arguments that could be made by the CPC and, consequently, there is no need to enter such a report into evidence.

[29] Moreover, CUPW is asking the Board to reject the alternative request made by the CPC to divide the Seid report into separate parts, arguing that the CPC knew that the single employer issue was not allowed and maintaining that the expert cannot replace the Board in determining the identity of the employer. As for the probative value of the report, CUPW states that, if the Board allows this aspect, CUPW reserves all rights to make submissions in that regard.

D–Other Submissions by the CPC and CUPW

[30] In this case, the Board exceptionally allowed the supplemental submissions made by the CPC and CUPW reiterating the arguments set out above.

III–Analysis and Decision

[31] The Board must determine whether the Seid report is admissible as evidence in the context of the proceedings underway.

[32] In light of all of the submissions made by the parties, the Board rules that the report is admissible, but **only in part**.

[33] As the Supreme Court of Canada clearly explained in *R.* v. *Mohan*, *supra*, the admissibility of expert evidence is based on the following four criteria:

a) relevance;
b) necessity in assisting the trier of fact;
c) absence of any exclusionary rule;
d) a properly qualified expert.

[34] The Board is not bound in a strict sense by criteria established by courts of law, given that it is a quasi-judicial tribunal that is the master of its own proceedings pursuant to sections 16(*c*) and (*p*) of the *Code*, which read as follows:

> 16. The Board has, in relation to any proceeding before it, power
>
> ...
>
> (*c*) to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not;
>
> ...
>
> (*p*) to decide for all purposes of this Part any question that may arise in the proceeding, ...

[35] The procedural flexibility enjoyed by the Board pursuant to the above provisions allows it to be reasonably informed of the facts and specific aspects of a case in order to properly carry out its mandate. In this regard, the Board gives clear precedence to the pursuit of truth and the fulfilment of the objectives of the *Code* over compliance with strict procedural rules.

[36] However, in regard to the admissibility of an export report, it is useful to refer to the criteria established by the Supreme Court of Canada, since such criteria, including those respecting relevance and necessity, are in line with the Board's procedural framework.

[37] In *Air Canada, supra*, when it had to deal with the issue of the admissibility of an expert report, the Board clearly stated the following:

> [114] ... Administrative tribunals exercise a great deal of discretion with respect to the admissibility of evidence; nonetheless, the evidence must be relevant and appropriate. In the instant matter, the Board is asked to rule on the labour relations purpose that underlies the application. The Board's decision is based on the facts before it and the application of the law. The Board is enlightened by such evidence that will give it the necessary insight as to the particular industry under review, including any economic, statistical and sociological information that provides an explanation for the organization of the industry and its labour relations. It is then up to the Board to interpret and apply the *Code* according to its accepted principles and spirit.

[38] In the matter now before the Board, the CPC wishes to enter the Seid report into evidence on the basis that it is an expert report on concessions and franchises.

A–Timeliness of Union's Objection

[39] In its submissions, the CPC argues that the objection raised by the union regarding the admissibility of the Seid report was not filed on time and should consequently be rejected, since the CPC announced that it wanted to call an expert witness on April 27, 2011.

[40] The union could not address the relevance and content of the expert report before the CPC sent the report to it, on November 21, 2011. The union filed its objection to the admissibility of the report as soon as it could, that is, when the hearing resumed on November 25, 2011. The Board rejects this argument by the CPC.

B–Relevance

[41] With respect to the relevance of the expert report, the Board acknowledges that it does not have *ex officio* knowledge of the business rules applicable to franchises and concessions. In the instant matter, the Board must determine the true employer of the employees covered by the application for

certification filed by the union. The different employers in this case have indicated that they adopted a business model specific to the franchise. The Board's concern is to proceed as efficiently as possible in seeking out the truth and it therefore considers it useful to obtain expert evidence on a specific element that will help it gain a better understanding of the contractual relationship between the different parties to the matter.

[42] Even if the Board had had some doubts as to the relevance of an expert report on concessions and franchises, the *audi alteram partem* rule would have prompted it to admit the expert report. In *Droit administratif*, Volume 1, 6th Edition (Cowansville (Quebec): Éditions Yvon Blais, 2010), Professor Patrice Garant aptly stated the following:

> Where a tribunal doubts the relevance of evidence or where the adverse party raises an objection, the onus is on the party wishing to file the evidence to prove its relevance. A tribunal must be cautious, however, as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision.
>
> (translation; page 639)

[43] The Board will accordingly allow the expert report produced by Mr. Seid pertaining to the business rules applicable to franchises and concessions, although the report will not be admitted in its entirety, for the reasons set out below.

C–Necessity

[44] Although the Board is mindful of the importance of allowing the CPC to present the evidence it deems relevant and defend itself in the matter before it, the Board's openness in this regard is not unlimited.

[45] The Board read the Seid report, in particular the sections entitled "Claims Made by CUPW," "The Franchise Agreement–The Master Dealer Agreement" and "My Opinions in the Matter." In the section entitled "Claims Made by CUPW," Mr. Seid makes a point-by-point analysis of the union's arguments and indicates that he obtained a translation of a CUPW document dated May 3, 2010. To begin with, the file before the Board does not show that any document was sent by the union on the

date indicated and the Board was unable to find the said document, the translation of which the expert would have analyzed, with adapted numbering.

[46] Furthermore, the last three sections of the expert report are in fact a legal analysis of the issue to be decided by the Board, that is, the identity of the true employer of the employees covered by the certification application filed by the union.

[47] The Board has found itself in a similar situation in the past, in *TELUS Communications Inc.*, *supra*. In that matter, it refused to admit two expert reports addressing centralization in industrial relations and corporate integration, holding that the reports offered opinions on matters that fell within the Board's expertise and knowledge as an expert tribunal specializing in labour relations:

> [76] The Supreme Court of Canada has held expert evidence may be admissible if it is necessary in the sense that its subject likely eclipses the experience or knowledge of the adjudicator and that the evidence itself enables the adjudicator to appreciate a matter in issue due to its technical nature (see *R.* v. *J.-L.J.*, [2000] 2 S.C.R. 600; and *R.* v. *Mohan*, *supra*). It has also held that expert evidence may become necessary in circumstances when crucial information is unavailable or when the adjudicator might reach an incorrect conclusion without it (see *R.* v. *D.D.*, [2000] 2 S.C.R. 275). In light of these standards, the Board is of the view that large segments of the Mosco report and the entire text of the Trebilcock report are inadmissible, since they offer opinions on matters that are within the Board's expertise and knowledge as an expert tribunal specializing in labour relations.
>
> ...
>
> [78] Plainly, the portions of the Mosco report addressing centralization in industrial relations and corporate integration, and the essence of the Trebilcock report speak to, provide advice and make conclusions on matters that fall squarely within the Board's knowledge and statutory mandate as a specialized labour relations tribunal. This is not to say that the proposed evidence might not qualify as expert opinion in another forum but, by virtue of the Board's specialized labour relations knowledge, the proposed evidence would not be helpful or necessary in the present context.

[48] The Board reaches the same finding in the instant matter. As an expert tribunal specializing in labour relations, the Board will in fact be able to assess which employer is the true employer, within the meaning of the *Code*, of the employees covered by the certification application on the basis of the evidence presented by the parties to the matter. It is the Board's preserve to determine this labour relations issue, and it is not the place of a specialist in franchises and concessions to dictate the conclusion to which the Board should arrive pursuant to the provisions of *Code*.

[49] Consequently, only pages 1 through 38 of the report (up to the heading "Claims Made by CUPW") and appendices I, II and III thereto are admissible as evidence. The Board wishes to point out that there is a difference between admissibility of a document as evidence and probative value. The parties will have the opportunity to make their arguments regarding the probative value of the Seid report in their respective oral submissions at the upcoming hearings.

[50] As for Mr. Seid's comments that could also have applied at the same time to the single employer issue under section 35 of the *Code*, it goes without saying that the Board will disregard them, as that issue was put on hold for now and is not part of the matter at issue before the Board.

D–Recognition of Expert Qualifications

[51] The Board also notes that the union did not waive challenging Mr. Seid's adequate qualifications as an expert. The union will have the opportunity to make any arguments in this regard once it has questioned Mr. Seid on his qualifications when the latter is called to testify in the upcoming hearings.

[52] This is a unanimous decision of the Board.

Louise Fecteau
Vice-Chairperson

Patrick Heinke
Member

Norman Rivard
Member